In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1149

AUGUST J. LIPPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Appendix B) is reported at 342 F. 2d 218. The opinion of the district court (App. 10a-22a)[1] is not reported.

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[1] "App." refers to the appellant's 24-page printed appendix. "Tr." refers to the transcript of the trial testimony, a copy of which we are filing with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1965. A petition for rehearing was denied on March 31, 1965. On April 26, 1965, Mr. Justice Brennan ordered the time for filing a petition for a writ of certiorari extended to May 10, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether evidence of similar offenses, committed during a continuous 20-year period prior to those alleged in the indictment, was properly admissible as bearing upon petitioner's intent and knowledge.

STATEMENT

Petitioner, president of the First National Bank of Exeter, Pennsylvania, was convicted in the United States District Court for the Middle District of Pennsylvania, on 34 counts charging him with willfully aiding co-defendant Daileda, cashier of the bank, in the misapplication of bank funds (counts 1-27), making false entries in bank books and records (counts 28-30) and filing with the Comptroller of Currency false and fraudulent reports (counts 31-34), in violation of 18 U.S.C. 656, 1001 and 1005 (App. 5a; Tr. 709-710, 721-723, 724-726). Daileda entered a plea of guilty and testified as a government witness (App. 4a). Petitioner's aggregate sentence was imprisonment for five years, probation for five years

and payment of a $10,000 fine (App. 7a). On appeal, petitioner's conviction was affirmed.

1. The evidence showed that from September 1959 to January 1962—the period covered by the indictment—petitioner issued 27 different checks for which there were insufficient funds in his checking account (App. 12a). Daileda, who covered these checks, told petitioner that bank funds were being used and repeatedly requested that petitioner refund the money. During the period of the indictment, petitioner made no deposits in his checking account to cover the checks (Tr. 141-144). The bank ledger cards and other evidence showed that on the day each check was cleared, either a sufficient deposit was then made to cover the check or Daileda produced cash and "brought back" petitioner's check which was being held up by the head teller. Daileda had to make false entries to conceal the amount of $38,976.88 he was covering for petitioner (App. 12a-13a). In "Reports of Conditions" (financial statements) forwarded to the Comptroller of Currency, false and fraudulent representations were made to conceal this misapplication (Tr. 268-275). Before signing these reports, petitioner was reminded by Daileda of the necessity for reimbursing the bank for deposits withheld and he promised reimbursement (Tr. 275-277).

2. Daileda testified that in 1942 petitioner asked him to make good some checks for which there were insufficient funds on deposit. Daileda covered checks for approximately $6,000 after explaining to petitioner that he would have to use bank funds. Peti-

tioner paid back the $6,000 in about nine months (Tr. 137-139). According to Daileda, this collaboration with petitioner continued from 1943 to January 1962, during which period he repeatedly told petitioner that he was using bank funds and insisted that the funds be restored. During the 1940's Daileda covered for about $7,000 in petitioner's checks and during the 1950's for about $20,000. Petitioner would repay the money within from nine months to a year and a half (Tr. 139-141).

Before this testimony was received the court had instructed the jury (Tr. 136-137):

> * * * We are going to allow testimony concerning acts or discussions or events prior to 1959, but solely for the purpose of bearing on the defendant's knowledge and on the defendant's intent, and not in any way to be considered by you as establishing the commission of crimes during the period 1942 to 1959. We're not concerned with crimes or offenses as such during that period. We are concerned with whether or not this defendant is guilty of the crimes with which he's been charged during the period 1959 to 1962, and to that extent and toward that end we will allow this witness to testify how this alleged scheme or plan originated, and, once again, to be considered by you solely as bearing upon the intent and knowledge of this defendant relative to the crimes with which he's been charged during the period 1959 to 1962, and for that limited purpose we will allow this testimony and we will overrule the objection of the defendant.

During the court's final charge the substance of this limiting instruction was repeated (Tr. 737-738).

ARGUMENT

Contrary to petitioner's contention, the court did not err in permitting evidence of his prior similar offenses in having the bank cashier cover checks for which he had insufficient funds on deposit. This case does not involve a single similar offense committed some 20 years ago, as petitioner suggests; rather, there was a continuous pattern of conduct during the entire 20-year period. The conclusion that these prior acts were with criminal intent was not precluded by the fact that petitioner made repayments to the cashier; the offenses were consummated when the bank's funds were misapplied and there was always the possibility that petitioner would not make repayment. This evidence was therefore admissible on the basis that the court received it —as bearing upon petitioner's intent and knowledge in relation to the misapplication of bank funds charged in the indictment. It showed a pattern of conduct which was of direct and pointed relevancy to the offenses charged. *Morrison* v. *United States*, 270 F. 2d 1, 4-5 (C.A. 4), certiorari denied, 361 U.S. 894; *Whaley* v. *United States*, 324 F. 2d 356, 358 (C.A. 9), certiorari denied, 376 U.S. 911; *Sanseverino* v. *United States*, 321 F. 2d 714 (C.A. 10); *United States* v. *Tolub*, 309 F. 2d 286, 289 (C.A. 2); *Kowalchuk* v. *United States*, 176 F. 2d 873, 878 (C.A. 6); 2 Wigmore, *Evidence* (3rd Ed.), § 302.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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